83-5322

Supreme Court, U.S.
FILED
AUG 31 1983
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.____

CHARLEE ELLIOTT, Appellant

v.

MALCOLM DOUGLAS ELLIOTT, Appellee

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Rule 53 (1) of the Rules of this Court, motion is hereby made that the appellant be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit.

Charlee Elliott

Charlee Elliott

441 W. Ethel

Las Cruces, NM 88005

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No._____

CHARLEE ELLIOTT, Appellant

v.

MALCOLM DOUGLAS ELLIOTT, Appellee

AFFIDAVIT

I, Charlee Elliott, being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the appellant in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe I am entitled to the redress I seek in said case. 5. I will suffer irreparable damage if not permitted to prosecute this appeal. 6. The nature of said cause is briefly stated as follows:

Appellee brought suit to dissolve marriage, alleging nothing more in his pleadings than the fact that we were husband and wife. At the trial on the merits appellee testified over objection that a warranty deed in my favor was executed by him under duress and coercion and attempted to establish fraud. The trial court voided the warranty deed. I appealed to the state Supreme Court on the grounds that the trial court had no jurisdiction to try issues not alleged in the pleadings. The New Mexico Supreme Court affirmed the trial court, holding that undue influence, coercion, and duress are species of fraud and that they were pled with sufficient particularity if the facts alleged necessarily result in a conclusion of fraud. As the only fact alleged was marital status, the Supreme Court's ruling was based on an unanticipated construction of NMSA 40-2-2, first applied in Hughes v. Hughes, 96 NM 719, 634 P2d 1271, asserting fraud and undue influence to be presumed in transactions between spouses.

The motion for rehearing was thus the first available opportunity to challenge the constitutional vulidity of the Court's construction of 40-2-2 NMSA (1978), as being violative of my right to contract, to due process of the law and to equal protection of the law as guaranteed in the Federal Constitution Article I, Section 10, Amendment V and Amendment XIV. The New Mexico Supreme Court denied the motion for rehearing without comment.

The present proceeding is an appeal from the final judgement of the New Mexico Supreme Court, taken pursuant to 28 U.S.C. 1257 (2).

Charlee Elliott

Duly witnessed and sworn before me, a Notary Public, this 29th day of August, 1983.

Mary A Jacobson
Notary Public

OFFICIAL SEAL
MARY A. JACOBSON
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires 3-16-87

83-5822

Supreme Court, U.S.
FILED
AUG 3[illegible] 1983
Alexander L. Stevas, Clerk

JURISDICTIONAL STATEMENT

Charlee Elliott
441 W. Ethel
Las Cruces, NM 88005

Appellant Pro Se

August 29, 1983

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes and Rules Involved	3
Raising the Federal Question	4
Statement of the Case	7
The Question Is Substantial	11
Conclusion	14
Appendix	15

CITATIONS

	Page
Cases:	
Hughes v. Hughes, 96 NM 719, 634 P2d 1271	2,4,5,6,7,11
Overton v. Benton, 60 NM 384, 291 P2d 636	5,11
Brown v. Gurley, 58 NM 153, 267 P2d 134	5,11
August v. Tillman, 51 NM 74, 178 P2d 590	5,11
Fullerton v. Kaune, 72 NM 210, 382 P2d 529 (1963)	5,11
Keeth Gas Co. v. Jackson Creek Cattle Co., 91 NM 87, 570 P2d 1069	6
Johnson v. Sanchez, 67 NM 41, 351 P2d 449 (1960)	6
Reger v. Preston, 77 NM 196, 420 P2d 779 (1966)	6
In re Estate of Reilly, 63 NM 352, 219 P2d 1069 (1957)	6
Missouri ex. rel. Missouri Ins. Co. v. Gehner, 1930, 50 S.Ct. 326, 281 U.S. 313, 74 L.Ed. 870	6
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 1930, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107	6
Unser v. Unser, 86 NM 648, 526 P2d 790 (1974)	11
LeBert-Francis v. LeBert-Francis, 194 A2d 662 (D.C.App. 1963)	11
Beals v. Ares, 25 NM 459, 185 P 780 (1919)	11
Ex parte Burrus, 1890, 10 S.Ct. 850, 853, 136 U.S. 586, 593-594, 34 L.Ed. 500	12
Rules and Statutes:	
NMSA 40-2-2 (1978)	2,3,5,12,14
NMSA 40-3-8A(5) (1978)	2,3,9,12
Rule 46, Civil Procedure, NMSA (1978)	3
Rule 11, III, Rules of Appellate Procedure, NMSA (1982 Cum. Supp.)	4
Rule 9(b), Rules of Civil Procedure, NMSA (1978)	4,12
Federal Rules of Civil Procedure, Rule 9 (b)	12
NMSA 40-4-14 (1978)	13
NMSA 45-5-101 to 45-4-502 (1978)	13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.____

CHARLEE ELLIOTT, Appellant,

v.

MALCOLM DOUGLAS ELLIOTT, Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Charlee Elliott, the appellant, appeals from the final judgement of the Supreme Court of New Mexico, dated May 5, 1983. Appellant asserts that Section 40-2-2, New Mexico Statutes Annotated (1978), as applied in this case, is repugnant to the Federal Constitution as being violative of appellant's right to contract, to due process of the law and to equal protection of the law, guaranteed by the United States Constitution Article I, Section 10, Amendment V and Amendment XIV.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico, which is reprinted in the appendix hereto, pp. 32-37, infra., is unreported.

The findings of fact and conclusions of law of the district court, dated August 19, 1982, which are reprinted in the appendix hereto, pp. 52-56, infra., are unreported.

JURISDICTION

The judgement of the Supreme Court of New Mexico, affirming in toto the judgement of the district court which voided the warranty deed executed by appellant and appellee, conveying the property to appellant as her sole and separate property, pursuant to N.M.S.A. 40-3-8A (5) (1978), was entered on May 5, 1983. See pp.32-37, infra. A motion for rehearing was entertained and denied on June 1, 1983. See p. 27, infra.

The New Mexico Supreme Court, in Mandate No. 14,593, dated June 16, 1983, remanded the cause to the district court.

A notice of appeal to this Court was duly filed both in the District Court of Dona Ana County on June 30, 1983, p. 21, infra., and in the New Mexico Supreme Court, p. 22, infra.

This appeal is being docketed in this Court within 90 days from the denial of a rehearing below. The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (2). Jurisdiction is also invoked under Article III, Section 2 of the United States Constitution whereby the Supreme Court has appellate jurisdiction, both as to law and fact, in controversies between citizens and subjects of foreign states, the amount in controversy exceeding $10,000. 28 U.S.C. 1332.

QUESTIONS PRESENTED

1. Whether Section 40-2-2, New Mexico Statutes Annotated (1978) is repugnant to the Federal Constitution; specifically that section which subjects transactions between spouses to the general rule of common law which controls the actions of persons occupying confidential relations with each other, particularly in the light of the recent New Mexico Supreme Court dicta in Hughes v. Hughes, 96 NM 719, 634 P2d 1271, p. 723, that "there is a presumption of undue influence in certain types of confidential relationships such as that between husband and wife, ...", and in the New Mexico Supreme Court ruling in the instant case that "the exercise of undue influence, duress and coercion in order to secure something of value from a person is a type of fraud."

2. Whether a statutory presumption of fraud in transactions between spouses is violative of the rights of married persons to contract with each

other, to due process of the law and to equal protection of the law, rights guaranteed to all citizens regardless of marital status under the Federal Constitution, Article I, Section 10, Amendment V and Amendment XIV.

3. Whether in an action for divorce, where no other facts are alleged in the pleadings beyond the assertion that the litigants are husband and wife, the trial court has jurisdiction to void any and all other transactions between spouses on the grounds of fraud, coercion, duress, and undue influence, there having been no amendment to the pleadings, nor any consent either express or implied to a trial of these issues.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

Article I, Section 10, United States Constitution:

> No State shall ... pass any ... law impairing the obligation of contracts ....

Amendment V, United States Constitution:

> No person shall be ... deprived of life, liberty, or property, without due process of law ....

Amendment XIV, Section 1, United States Constitution:

> No State shall ... deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 40-2-2, New Mexico Statutes Annotated (1978), Vol. 7, p. 14:

> Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.

Section 40-3-8A (5), New Mexico Statutes Annotated (1978), Vol. 7, p. 21:

> A. "Separate property" means:
> ...
> (5) property designated as separate property by a written agreement between the spouses...."

Rule 46, Civil Procedure, New Mexico Statutes Annotated (1978), Vol. 1, p. 133:

> Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. It shall not be necessary to file a motion for a new trial in order to preserve for review errors called to the attention of the trial court under this rule.

Rule 11, III, Rules of Appellate Procedure, New Mexico Statutes Annotated, Judicial Pamphlet 7, 1982 Cumulative Supplement, Vol. 1, p. 11:

> Jurisdictional questions may be raised at any time, etc.

Rule 9 (b), Rules of Civil Procedure, New Mexico Statutes Annotated (1978), Vol. 1, p. 31:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

RAISING THE FEDERAL QUESTION

At the earliest stage in the trial on the merits in the district court in December, 1981, appellant objected to the admission of any testimony or evidence attempting to establish fraud, coercion, duress, or undue influence regarding the execution of the warranty deed on the grounds that the court had no jurisdiction to try issues not presented in the pleadings. Although neither party moved to amend the pleadings, the court overruled appellant's objections and permitted appellee to attempt to establish fraud. Although appellee's pleading never even admitted entering into any contract or executing any written agreement or warranty deed with appellant regarding separate or community property status of any real property, much less alleging with particularity that the transaction was tainted by fraud, the district court in August, 1982, voided the warranty deed on the grounds of undue influence, coercion, duress, and fraud, pp. 65-68, infra.

Appellant argued before the New Mexico Supreme Court that the district court erred in finding undue influence, coercion, duress, and fraud, because fraud or its various species were not specifically alleged in the pleadings. Appellee argued that since the New Mexico Supreme Court opinion issued in October, 1981 (fully 17 months after the inception of the instant case and published in the New Mexico Reports months after the trial on the merits, but months before the trial court issued its findings of fact and conclusions of law), in Hughes v. Hughes, 96 NM 719, 634 P2d 1271, p. 723, that there is a presumption of undue influence in certain types of relationships such as that between husband and wife, that therefore in actions between spouses it is not necessary to specifically allege fraud, coercion, duress or undue influence. The New Mexico Supreme Court affirmed the district court using

the rationale that "an allegation of facts from which a conclusion of fraud necessarily results is sufficient." The only facts alleged in these pleadings are that the parties are husband and wife, and that the ultimate source of the funds used for the purchase of the property was appellee's separate property. Only if contracts between spouses are presumed fraudulent can the facts alleged in these pleadings necessarily result in the conclusion of fraud.

It was at this point that the question of the constitutional validity of 40-2-2, N.M.S.A. (1978), was drawn sharply into focus. In appellant's Motion for Rehearing, First Amended Motion for Rehearing, and Brief in Support for a Motion for Rehearing, appellant challenges the constitutional validity of N.M.S.A. 40-2-2 as applied in Hughes v. Hughes, supra, and Elliott v. Elliott, arguing that a statutory presumption of fraud in transactions between spouses denies not only the appellant, but all spouses in New Mexico, the constitutionally guaranteed right to contract, to due process and to equal protection of the law extended to all citizens regardless of marital status. In previous cases the New Mexico Supreme Court did not presume fraud between spouses, e.g., Overton v. Benton, 60 NM 384, 291 P2d 636; Brown v. Gurley, 58 NM 153, 267 P2d 134; August v. Tillman, 51 NM 74, 178 P2d 590. Moreover, New Mexico Rules of Civil Procedure, Rule 9, New Mexico Statutes Annotated (1978, Vol. 1, p. 33, citing Fullerton v. Kaune, 72 NM 210, 382 P2d 529 (1963), states: "Allegation of confidential relation is insufficiently particular" (to raise the issue of fraud). Appellant argues that this recent, unanticipated evolution of New Mexico case law which now presumes undue influence and fraud in confidential relationships, especially between spouses, so alters the meaning of N.M.S.A. 40-2-2 as to make it repugnant to the Federal Constitution, and that not until the New Mexico Supreme Court issued its opinion regarding the jurisdiction of the district court to try the issue of fraud, was there an opportunity to challenge the constitutionality of N.M.S.A. 40-2-2.

Although the constitutional issues were explicitly addressed in the Motion for Rehearing, First Amended Motion for Rehearing, and Brief in Support for Rehearing, pp. 28-31, infra., the New Mexico Supreme Court

denied the motion without comment, p. 27, infra. Further, the court has since twice refused to issue the required certificate verifying that the federal issue was raised, considered and ruled on by the court. Justice Riordan, on behalf of the court, refuses to certify anthing other than the briefs submitted to the court, unless the case is remanded by the United States Supreme Court.

The New Mexico Supreme Court has repeatedly held when the issue of the constitutionality of a statute or a violation of constitutional rights has not been raised in trial court or in the brief in chief, the question will not be permitted on review. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 NM 87, 570 P2d 918 (1977); Johnson v. Sanchez, 67 NM 41, 351 P2d 449 (1960); Reger v. Preston, 77 NM 196, 420 P2d 779 (1966); In re Estate of Reilly, 63 NM 352, 219 P2d 1069 (1957).

The United States Supreme Court has held that a federal question raised for the first time on a petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, at variance with a construction formerly adopted by it, or where such a construction was not reasonably anticipated. Missouri ex. rel. Missouri Ins. Co. v. Gehner, 1930, 50 S.Ct. 326, 281 U.S. 313, 74 L.Ed. 870; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 1930, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107. Justice Brandeis, delivering the majority opinion in Brinkerhoff-Faris, supra, wrote:

> "The plaintiff seasonally filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional federal claim thus was made timely, since it was raised at the first opportunity .... If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious .... The violation is none the less clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute. The federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government" (citations omitted).

The New Mexico Supreme Court's construction of N.M.S.A. 40-2-2 (1978), in Hughes v. Hughes, supra, was published in the New Mexico Reports months

after the trial on the merits of this case. The construction was a departure from previous constructions and could not have been reasonably anticipated by appellant. The district court issued its findings of fact eight months after the trial on the merits and many months after the general publication of Hughes v. Hughes; it thus had ample opportunity to apply this new construction in its determination of the case, although it nowhere explicitly stated that it had done so. Nowhere in the Hughes v. Hughes decision did the state supreme court discuss the sufficiency of the pleadings in order to raise the issue of fraud and its subspecies in transactions between spouses, nor explicitly state that the allegation that the parties are husband and wife obviates the necessity to plead fraud with particularity. Thus the court's construction could not be challenged before its ruling to affirm the trial court.

STATEMENT OF THE CASE

Appellant and Appellee were married to each other in Grant County, New Mexico, on December 12, 1975. They permanently separated in May 1980, appellee filing a petition for dissolution of marriage on May 13, 1980. A minor son was born of the marriage who has been placed in custody of appellant. Subsequent to her pregnancy, appellant was a full-time homemaker, not employed outside the home. In 1976 the parties moved to Oregon, then to England, appellee being a native Briton, acquiring resident alien status in the United States as a consequence of his marriage to appellant. In 1979 the parties returned to New Mexico separately, then for a time engaged in a series of trial separations and reconciliations, and received marriage counseling. Appellee's witness, his former counselor, testified that when appellee entered therapy in May, 1979, he reported that appellant had requested a divorce.

On June 15, 1979, the parties entered into a contract for the purchase of a residence located at 441 W. Ethel, Las Cruces, Dona Ana County, New Mexico, whereby title to the house and lot would be acquired in the names of both parties as Joint Tenants with right of survivorship. Funds for the purchase of the property had previously been invested in Certificates of Deposit, held in the names of both parties as Joint Tenants with right

survivorship; and before that had been held in interest bearing bank accounts in the names of both parties as Joint Tenants with right of survivorship. The undisputed ultimate source of the funds, however, was from an inheritance received by appellee from England.

Both appellee and appellant at trial testified to discussions between themselves, prior to signing the purchase contract on June 15, 1979, regarding appellee's promise to purchase a residence for appellant and the children in the event of a divorce, although appellee denied that he intended the offer to apply to the Las Cruces property. Subsequent to signing the purchase contract for the property, the parties continued to experience increasingly intense marital conflict, culminating in appellee's demand that appellant specifically perform his prior promise to provide a secure home for appellant and the children in the event of a divorce. Appellant then refused to sign the deed as co-tenant or to move into the residence unless appellee ceded title and interest in the property. Appellant and appellee agreed that title would be taken in the names of appellant, the parties' minor son Lucas, and appellant's minor daughter Seana. This arrangement was proposed to Realtor John Gallagher by the parties on June 26, 1979. Mr. Gallagher recommended that the parties consult an attorney to prepare the deed, and an appointment was made to consult an attorney for the morning of June 28, 1979.

On June 27, 1979, appellee sustained a fractured left index finger while at work, for which he was treated at the hospital emergency room that afternoon. His treatment consisted of diagnostic x-rays, a splint, and a three-day supply of Tylenol 3 and Phenaphen, identical analgesics. The following morning appellee elected not to accompany appellant to the consultation with the attorney. At the consultation, appellant requested that the title be prepared and name as co-tenants herself and both children with appellant's mother named as trustee for the children's interest. The attorney ascertained the source of the funds for the realty purchase and also the high probability of impending divorce, and he recommended that appellant take title in her name only, thereby avoiding gift taxes. Appellant was unpersuaded to this course, and the attorney agreed to further research case and statutory law regarding gifts to children and vesting title in a conservator.

The afternoon of June 28, 1979, after appellant returned from the attorney's office, appellee checked into a motel where he resided separately until both parties moved into the residence on Ethel Street on July 7, 1979, although the parties remained in daily contact during that time.

On July 3, 1979, in the presence of appellee, appellant received, and together they read, a letter from the attorney detailing the manner in which he had drawn up title to the house and his reasons therefor. Realtor Gallagher received a similar letter that day, and both the parties discussed the form of conveyance with Mr. Gallagher. On the morning of July 6, 1979, both parties appeared at the title company and signed the warranty deed conveying the residence to appellant as her sole and separate property pursuant to N.M.S.A. 40-3-8A (5).

The following evening they together took up residence in the Ethel Street property where they cohabited until appellee moved out and filed for divorce on May 13, 1980. Appellant and the children continue to reside there.

In his petition appellee makes the following allegations regarding property:

> 5. During the course of this marriage, the parties thereto have acquired certain items of community property to be divided equitably between the parties. Petitioner has purchased certain property with his separate funds which were inherited and such property should be declared his separate property regardless of manner in which the title is presently held. Community property and separate property is set out specifically on a separate list which is appended hereto and made a part hereof by reference as Exhibit "A". p. 68 , infra.

Exhibit "A" lists as separate property of petitioner "residence located at 441 W. Ethel, Las Cruces, New Mexico purchased with Petitioner's separate funds, which were an inheritance." pp.65-68, infra. The duly executed and duly filed warranty deed to the Ethel Street property was not appended to the pleadings. The original deed was removed by appellee from the parties' joint safe deposit box when he filed suit, but a certified copy of the recorded deed was introduced into evidence at trial by appellant over appellee's objections. In no way can such pleadings be construed to have given notice to appellant that her title to the property could be challenged on the grounds of fraud, unless, as appellee argued, N.M.S.A. 40-2-2 sets up a statutory presumption of fraud in transactions between spouses.

The facts found by the trial court as to the existence in fact of a confidential relationship between the parties were silent except as to the fact that they were married. There were no findings either that appellee placed confidence and trust in appellant, or that appellant held dominion over appellee. The conclusions of law bearing on the subject were similarly silent. Nevertheless the trial court found: "11) That thereafter, petitioner, while ill and under medication, signed the deed under duress and coercion, respondent having refused to move into the family's residence unless title to the house was in her name only." And the court concluded: "6) That the warranty deed in favor of the Respondent was signed by petitioner as a result of undue influence, duress and coercion."

The New Mexico Supreme Court affirmed the trial court and additionally found that "the exercise of undue influence, duress and coercion in order to secure something of value from a person is a type of fraud."

In its discussion of the sufficiency of the evidence to sustain a finding of fraud, the New Mexico Supreme Court went well beyond the findings of the trial court. There was no evidence that either party had ever seen an American deed prior to July 6, 1979. There was substantial evidence, however, that appellee with appellant had engaged an Oregon attorney to prepare a real estate contract in July of 1978; also that both parties had consulted a Las Cruces attorney in regard to a real estate contract in May of 1979. In light of this evidence the trial court found only that appellant had independently consulted the attorney who prepared the conveyance for the Ethel Street property. The state Supreme Court, however, asserted that appellee "did not know the differences among 'tenants in common,' 'joint tenancy,' 'separate property,' and 'community property'." Although reiterating the principle that "a finding supported by substantial evidence must be sustained on appeal, the state Supreme Court manufactured additional findings not made by the trial court, in order to sustain the ultimate finding of fraud.

THE QUESTION IS SUBSTANTIAL

The question as to the Article 1, Section 10, Fifth Amendment, and Fourteenth Amendment implications of the presumption of fraud and its subspecies, duress, coercion and undue influence, in transactions and contracts between spouses is a novel and substantial one. It has never been treated before by this court. Indeed, prior to Hughes v. Hughes, supra, the position of the New Mexico Supreme Court as reported in Overton v. Benton, supra, was:

> Where the husband purchases real estate with his own or community funds and has the title conveyed to his wife alone, the presumption is that he has made a gift to her and that the property so conveyed is her separate estate. Brown v. Curley, supra; August v. Tillman, supra.

In Fullerton v. Kaune, supra, where the parties were not married to each other, but the pleadings did allege that a confidential relation existed between them, the New Mexico Supreme Court held that allegation to be insufficiently particular to raise the issue of fraud.

The New Mexico Supreme Court's opinion in Unser v. Unser, 86 NM 648, 526 P2d 790 (1974), extensively treated the issue of the presumption of fraud in transactions between spouses, quoting LeBert-Francis v. LeBert-Francis, 194 A2d 662 (D.C. App 1963):

> More recent cases hold that there is no presumption that separation agreements are fraudulent, and that the one who asserts the invalidity of such agreements has the burden of proving that it is tainted by fraud, duress or overreaching.... The modern trend holds that when a husband and wife have separated or are about to separate and seek by agreement to settle their respective rights and obligations, they deal at arm's length.

The court in Unser v. Unser, supra, further held:

> In each situation, the relationship that exists between the parties when the questioned transaction occurs or is undertaken is critical. The presumption of fraud that may be utilized to the aid of the party seeking to set aside the transaction is available only to the one proving that they were in the confidential relationship and the other party was in the dominant position. Without the fiduciary relationship existing in fact at the time of the agreement then, to set aside the transaction requires that fraud and misrepresentation be proven by the challenging party in the ordinary sense.... The facts found by the trial court as to the confidential relationship of the parties were silent except as to the fact that they were married.... Making a presumption of fraud and the imposition upon the appellant of the burden of disproving fraud under the Beals v. Ares, supra (25 NM 459, 185 P 780 (1919)), formula was erroneous." (Citation added.)

The presumption of fraud or its subspecies in contracts between spouses conflicts not only with previous New Mexico case law, but with New Mexico statutory law as well. When the New Mexico legislature classified as separate property under 40-3-8A (5) "property designated as separate property by a written agreement between the spouses," its clear intent was that such a written agreement is untainted by a presumption of fraud and can only be avoided if challenged in the ordinary manner by pleading fraud with specificity. New Mexico Rules of Civil Procedure Rule 9 (b), which is identical with Federal Rules of Civil Procedure 9 (b), requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." But in its decision in this case the New Mexico Supreme Court's position is that the facts alleged, i.e., that the parties are husband and wife, are facts from which the conclusion of fraud necessarily results. Such a position clearly abridges appellant's right to contract, deprives appellant of property without due process of law, and denies appellant equal protection of the law.

While the implications of the New Mexico Supreme Court's construction of 40-2-2 have immediate import to appellant and her federally guaranteed rights, they have an even greater import to society at large. Although the Supreme Court has long held that "the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," Ex parte Burrus, 1890, 10 S.Ct. 850, 853, 136 U.S. 586, 593-594, 34 L.Ed. 500, yet the fact is that for the past fifty years the federal government has steadily extended its jurisdiction over the area of domestic relations and the family. Aid to Families with Dependent Children, for example, is a federal program, though administered by the states. The Child Support Enforcement Program, mandated by the 1975 Social Security Act, is a federal program, even though the judgements it seeks to enforce have been determined by the state judiciary. The Federal Bureau of Investigation is now mandated to enforce custody orders of the state courts when there is reason to believe that the non-custodial parent has removed the child beyond the state line. Clearly, the executive

and legislature have come to realize that the federal government has a legitimate and vital interest in domestic relations. So also the United States Supreme Court must eventually overcome its disinclination to exercise jurisdiction over domestic relations laws whether that jurisdiction arises by the constitutional challenge to a state statute, by the violation of a citizen's constitutional rights or by diversity of citizenship.

Before the advent of "no-fault divorce" in New Mexico as well as in other states, the family residence, along with child custody, was frequently awarded to the dependent spouse, usually the wife, whose contribution to the economic partnership of the marriage was in terms of her productivity as child-bearer and homemaker. Although the courts may have tacitly recognized the economic disadvantages faced by the displaced homemaker suddenly thrust unprepared into the competition of the job market, the more frequent rationale for such a property division was to provide a secure and stable home environment in which the children could continue to be raised. Since the advent of "no-fault divorce" the courts, especially in community property states like New Mexico, have treated the family home as just another asset of the community (in which the children have no recognized interest) to be divided equally upon the dissolution of the marriage.

This judicially imposed result may not have been the intent of the legislature when they enacted "no-fault divorce," at least in New Mexico, for the legislature also provided in 40-4-14, N.M.S.A. (1978):

> In proceedings for the dissolution of marriage, separation or support between husband and wife, the court may make an allowance of certain property or properties of either party or of both parties for the maintenance, education and support of the minor children of the parties, and may vest title to the part of the property so allowed in a conservator appointed by the court. The conservator must qualify and serve in such capacity as provided in Sections 5-101 through 5-502 (45-5-101 to 45-4-502 NMSA 1978) of the Probate Code.

Unfortunately this option is so rarely exercised by the courts that its very existence is unknown to most domestic relations attorneys.

Knowing this to be the trend of the courts, when facing the prospect of the final, irremedial breakdown of the marriage, to what extent, and under what circumstances, may spouses bargain with each other regarding

division of property? As the New Mexico Supreme Court has construed 40-2-2, spouses may not bargain at all, for any contract is presumed fraudulent and voidable.

Equally affected by the New Mexico Supreme Court's construction of 40-2-2 would be the situation between Attorney A and Physician Z. Let us propose that both of them have substantial earned incomes in excess of living expenses, as well as substantial assets, perhaps in the form of certificates of deposit, or stock or bonds, as well as substantial unearned income from their investments. Attorney A and Physician Z may negotiate a contract for the purchase of an apartment building, and that contract will be presumed free of fraud. But if A and Z later marry and then, using their separate property, negotiate a second contract for the purchase of an office building, that second contract would be presumed fraudulent, and by filing a petition for dissolution of marriage and alleging no more than that the parties are husband and wife, the deed to the office building could be voided by the district court.

These diverse situations demonstrate that the question raised in this appeal is substantial and of importance not only to the appellant, nor only to married persons seeking to exercise their right to contract, but to society at large. The Supreme Court of the United States has been the court of last resort to all those citizens seeking equal protection of the law regardless of race, sex, religion or national origin. Let the court now extend its jurisdiction and guarantee to all citizens due process and equal protection of the law regardless of marital status.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

CHARLEE ELLIOTT
Appellant Pro Se
441 W. Ethel
Las Cruces, NM 88005

APPENDIX

H. Gregg Privette
ATTORNEY AT LAW
215 South [redacted]
LAS CRUCES, NEW MEXICO 88001
505-523-4507

August 16, 1983

Justice William Riordan
New Mexico Supreme Court
P.O.Box 848
Santa Fe, New Mexico 87503

Re: Elliott v. Elliott
Docket No. 14, 503

Dear Justice Riordan,

Enclosed herewith is a proposed substitute Certificate, as required in order to appeal the constitutional question as raised in the above referred to matter to the United States Supreme Court. This is requested in place of the Certificate previously requested and by the Court refused.

This requested Certificate is, I feel, explicit within itself. All of the subject matter in the proposed Certificate, as herein offered, is substantiated in the references in my letter of July 18, 1983.

The Court's consideration of this request will be appreciated.

Very truly yours,

H. Gregg Privette

H. Gregg Privette

cc with enclosure: Graden W. Deal, Esq.
Attorney for Appellee

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

vs.

CHARLEE EVELYN ELLIOTT, Docket No. 14,593

Respondent-Appellant.

CERTIFICATE AS TO EXISTENCE OF A FEDERAL QUESTION

This Court hereby certifies that in this appeal and in the arguments by brief made in this Court on behalf of the appellant, both in the appeal and in support of appellants Motion for Rehearing, it was insisted by the appellant that under the facts of this case that N.M.S.A 40-2-2 is repugnant to the federal constitution in that contracts between spouses are subject "to the general rules of common law which control the actions of persons occupying confidential relations with each other. The New Mexico Supreme Court in Hughes v. Hughes, 46 NM 719, 634 P2d 1271, has held that,"there is a presumption of undue influence in certain types of relationships such as that between husband and wife." In Elliott v. Elliott, the instant case, the court has ruled that A) "The exercise of undue influence, duress and coercion in order to secure something of value from a person is a type of fraud", and B) that fraud in the instant case was pleaded with sufficient particularity solely by the assertion that the parties to the transaction were husband and wife. In light of the decision in the instant case the appellant has argued that under the provisions of N.M.S.A. 40-2-2, spouses cannot in fact enter into binding contracts with each other since any such contracts are presumed

... and therefore the constitutional rights ... contract with each other, to due process and to equal protection of the law, as guaranteed by Article I, Section 10; Amendment V and Amendment XIV of the United States Constitution, are violated by N.M.S.A. 40-2-2.

Appellant raised the issue of the jurisdiction of the court to hear and decide on the issue of fraud and of the sufficiency of the pleadings to raise the issue of fraud, both in the trial court and in the State Supreme Court. And the appellant specifically addressed the constitutionality of N.M.S.A. 40-2-2 in her motion for a rehearing and in her brief in support of her motion for a rehearing. New Mexico Civil Rules of Procedure, Rule 60, N.M.S.A. (1980) permits attack on subject matter jurisdiction to be made at any time during proceedings.

WILLIAM RICHARD, Justice

H. GREGG PRIVETTE
ATTORNEY AT LAW
215 South [illegible]
LAS CRUCES, NEW MEXICO 88001
505-523-4507

July 18, 1983

Justice William Riordan
New Mexico Supreme Court
P.O.Box 848
Santa Fe, New Mexico 87503

Re: Elliott v. Elliott
Docket No. 14,593

Dear Justice Riordan.

Enclosed herewith is a proposed Certificate, as required in order to appeal the constitutional question as raised in the above referred to matter to the United States Supreme Court. It will be appreciated if the Court will issue the Certificate so that prosecution of the appeal can go forward.

Supporting this request, I would direct the Court's attention as follows:

1. Appellant's Brief in Chief; Point I, A; pp 1-5 wherein was raised the courts jurisdiction to hear and rule upon the issue of fraud.
2. Appellant's Reply Brief; Point I, B; pp 2 and 3 wherein evidence of fraud is objected to.
3. The Court's decision wherein, for the first time in this case, the constitutional issue is put in focus, because the Court's decision makes Section 40-2-2, N.M.S.A, repugnant to the constitution.
4. The Motion for Rehearing wherein the constitutional issue is addressed.
5. And Appellant's Brief in Support of Motion for Rehearing; Point IV; pp 8-10 wherein the constitutional issue is raised and discussed.

The Court's consideration of this request will be appreciated.

Very truly yours,

H. Gregg Privette

H. Gregg Privette

cc with enclosure: Graden W. Beal, Esq.
Attorney for Appellee

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

vs.

CHARLEE EVELYN ELLIOTT, Docket No. 14,593

Respondent-Appellant.

CERTIFICATE

Speaking for the New Mexico Supreme Court, I hereby certify that the Appellant in the above styled and numbered appeal timely raised the issue of the unconstitutionality of the Court's decision and Section 40-2-2, N.M.S.A., and that the constitutional issue was by the Court considered in its decision affirming the lower court's decision from which this appeal was taken

WILLIAM RIORDAN, Justice

ENDORSED COPY

IN THE THIRD JUDICIAL DISTRICT COURT

DONA ANA COUNTY, NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent.

FILED
1983 JUN 30 PM 4:23
DISTRICT COURT
DONA ANA COUNTY, N.M.
BERNICE MAYNES, CLERK

No. DR - 80 - 456
Judge Galvan

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Charlee Evelyn Elliott, the appellant in the above styled and numbered cause, hereby appeals to the United States Supreme Court from the final judgment of the Supreme Court of the State of New Mexico, affirming the lower court's decision, entered in this action on June 1, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

H. Gregg Privette
Counsel for appellant

I hereby certify that a copy of the foregoing Notice was delivered to opposing counsel of record this 30th day of June, 1983.

H. Gregg Privette

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

vs.

CHARLEE EVELYN ELLIOTT,

Docket No. 14,593

Respondent-Appellant.

NOTICE OF APPEAL

Notice is hereby given that Appellant-Respondent, Charlee Elliott, will appeal to the United States Supreme Court the decision of the New Mexico Supreme Court in the above styled and numbered cause.

Appellant-Respondent's appeal is based upon the unconstitutionality of the Court's decision in that the decision violates Article I, Section 10, of the United States Constitution prescribing State laws impairing the obligations of contracts; it violates Amendment V, in depriving Appellant of property without due process of law; and it violates Amendment XIV, in denying Appellant equal protection of the laws.

This appeal is further based upon the jurisdiction of the United States Supreme Court to review facts and law in matters in litigation between citizens of the United States and citizens of a foreign country.

Respectfullt submitted.

H. Gregg Priviette

H. Gregg Priviette
Attorney for Appellant

I hereby certify that a copy of the foregoing Notice was delivered to opposing counsel of record this 30th day of June, 1983.

H. Gregg Priviette

H. Gregg Privette
ATTORNEY AT LAW
215 South Campo St.
Las Cruces, New Mexico 88001
505-523-4507

June 29, 1983

Ms. Rose Marie Alderete, Clerk
New Mexico Supreme Court
Supreme Court Bldg.
P.O.Box 848
Santa Fe, New Mexico 87503

Re: Elliott v Elliott
Docket No. 14,593

Dear Rose Marie,

Enclosed is a notice of appeal in the above referred to matter. I will appreciate your filing it for me.

Very truly yours,

H. Gregg Privette

H. Gregg Privette

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

vs.

CHARLEE EVELYN ELLIOTT,

Docket No. 14,593

Respondent-Appellant.

NOTICE OF APPEAL

Notice is hereby given that Appellant-Respondent, Charlee Elliott, will appeal to the United States Supreme Court the decision of the New Mexico Supreme Court in the above styled and numbered cause.

Appellant-Respondent's appeal is based upon the unconstitutionality of the Court's decision in that the decision violates Article I, Section 10, of the United States Constitution proscribing State laws impairing the obligations of contracts; it violates Amendment V, in depriving Appellant of property without due process of law; and it violates Amendment XIV, in denying Appellant equal protection of the laws.

This appeal is further based upon the jurisdiction of the United States Supreme Court to review facts and law in matters in litigation between citizens of the United States and citizens of a foreign country.

Respectfullt submitted.

H. Gregg Privette

H. Gregg Privette
Attorney for Appellant

I hereby certify that a copy of the foregoing Notice was delivered to opposing counsel of record this 30th day of June, 1983.

H. Gregg Privette

IN THE THIRD JUDICIAL DISTRICT COURT

DONA ANA COUNTY, NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent.

No. DR - 80 - 456
Judge Galvan

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Charlee Evelyn Elliott, the appellant in the above styled and numbered cause, hereby appeals to the United States Supreme Court from the final judgment of the Supreme Court of the State of New Mexico, affirming the lower court's decision, entered in this action on June 1, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

H. Gregg Privette
Counsel for appellant

I hereby certify that a copy of the foregoing Notice was delivered to opposing counsel of record this 30th day of June, 1983.

H. Gregg Privette

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE NO. 14,593

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Dona Ana, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered DR 80-456 on your Civil Docket, wherein Malcolm Douglas Elliott was Petitioner and Charlee Evelyn Elliott was Respondent, by your consideration in that behalf judgment was entered against said Respondent; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by Respondent by appeal, whereupon such proceedings were had that on May 5, 1983, a Decision was entered by said Supreme Court affirming your judgment aforesaid, and remanding said cause to you.

NOW, THEREFORE, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with the Decision of the Court.

WITNESS, The Hon. H. Vern Payne, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 16th day of June, 1983.

(SEAL)

Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, June 1, 1983

NO. 14,593

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for Rehearing is hereby denied.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MALCOLM DOUGLAS ELLITOT,

Petitioner-Appellee,

-vs- NO: 14,593

CHARLEE EVELYN ELLIOTT,

Respondent-Appellant

FIRST AMENDED MOTION FOR REHEARING

COMES NOW Appellant-Respondent who moves the Court to rehear the above-styled and numbered cause on appeal. For her response, Appellant-Respondent states:

1. Undue influence, duress, coercion and fraud were not properly pleaded, and there was no admissable and credible evidence to sustain a finding thereon in Issue I.

2. Partition of co-tenancy realty and contribution for addition and repairs thereto were not properly pleaded and there was no credible and admissable evidence to sustain a finding thereon in Issue II.

3. There was no credible evidence to sustain a decision awarding the three rings to Appellee in Issue III.

4. The decision of the Court raises for the first time three violations of Appellant's United States Constitutional rights as guaranteed by Article I, Section 10; Amendment V and Amendment XIV. By the decision she is deprived of her right to contract, her right to due process of law and her right to equal protection of the laws. The decision so alters the meaning of N.M.S.A. 40-2-2 that it is now repugnant to the United States Constitution.

WHEREFORE, Appellant-Respondent moves the Court to rehear said matter and to re-consider its decision.

Respectfully submitted,

H. Gregg Pruiett

H. GREGG PRUIETT
Attorney for Appellant-Respondent
215 South Campo
Las Cruces, NM 88001
505/523-4507

I hereby certify that a copy of the foregoing instrument was mailed to opposing counsel of record this 13th day of May, 1983.

H. Gregg Pruiett

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

-vs-

No: 14,593

CHARLEE EVELYN ELLIOTT

Respondent-Appellant

MOTION FOR REHEARING

COMES NOW Appellant-Respondent who moves the court to rehear the above-styled and numbered cause on appeal. For her reasons, Appellant-Respondent states:

1. Undue influence, duress, coercion and fraud were not properly pleaded, and there was no admissable and credible evidence to sustain a finding thereon in Issue I.

2. Partition of co-tenancy realty and contribution for addition and repairs thereto were not properly pleaded and there was no credible and admissable evidence to sustain a finding theron in Issue II.

3. There was no credible evidence to sustain a decision awarding the three rings to Appellee in Issue III.

4. The decision of the Court raises for the first time three violations of Appellant's United States Constitutional rights as guaranteed by Article I, Section 10; Amendment V and Amendment XIV. By the decision she is deprived of her right to contract, her right to due process of law and her right to equal protection of the laws.

WHEREFORE, Appellant-Respondent moves the court to rehear said matter and to re-consider its decision.

Respectfully submitted,

H. Gregg Privette

H. GREGG PRIVETTE
Attorney for Appellant-Respondent
215 S. Campo
Las Cruces, NM 88001
(505) 523-4507

I hereby certify that a copy of the foregoing Motion for Rehearing was mailed to opposing counsel this 12 day of May, 1983.

H. Gregg Privette

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

FILED
MAY - 5 1983

MALCOLM DOUGLAS ELLIOTT,

Petitioner-Appellee,

vs. No. 14,593

CHARLEE EVELYN ELLIOTT,

Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY
Joe H. Galvan, District Judge

DECISION

RIORDAN, Justice.

Malcolm Douglas Elliott (Husband) filed a petition for dissolution of marriage to Charlee Evelyn Elliott (Wife) on May 13, 1980. After trial, the district court dissolved the marriage, divided the community property, and determined child custody, child visitation, child support and spousal support. Wife appeals. We affirm.

The issues on appeal are:

I. Whether the district court erred in finding that the warranty deed was signed by Husband as a result of undue influence, duress and coercion.

II. Whether the district court erred in finding that Husband had a $12,000.00 separate property lien on the parties' residence.

III. Whether the district court erred in finding that the three diamond rings were Husband's separate property.

IV. Whether the district court erred in its conclusion regarding child custody and visitation rights.

V. Whether the district court erred in determining that Wife is "healthy."

Husband and Wife were married on December 12, 1975, in Grant County, New Mexico. They permanently separated in May 1980. A minor son was born of the marriage.

Wife has a B.A. degree in Psychology plus one year of post-graduate education. Husband was born in England and had worked as a dental technician.

I. "Fraud"/Substantial Evidence

Wife argues that the district court erred in finding that the warranty deed was signed by Husband as a result of undue influence, duress and coercion because the pleadings did not specifically allege undue influence, duress and coercion, and because there was insufficient evidence to prove undue influence, duress and coercion. We disagree.

The exercise of undue influence, duress and coercion in order to secure something of value from a person is a type of fraud. Cardenas et ux. v. Ortiz, 29 N.M. 633, 226 P. 418 (1924). The circumstances which constitute fraud must be alleged with particularity. N.M.R. Civ. P. 9(b), N.M.S.A. 1978 (Repl. Pamp. 1980). However, words such as "fraud" or "fraudulent" are unnecessary when pleading fraud, provided that:

> [T]he facts alleged are such as constitute fraud in [and of] themselves, or are facts from which fraud will be necessarily implied. The acts charged are not less fraudulent because the word 'fraud' or 'fraudulent' is not employed by the pleader in characterizing them. In other words, an allegation of facts from which the conclusion of fraud necessarily results is sufficient. Neither law nor equity requires that the specific details of the transaction in which fraud is predicated, or facts which are merely evidentiary, be pleaded. [Emphasis added.]

In re Trigg, 46 N.M. 96, 105, 121 P.2d 152, 158 (1942) (quoting 24 AM. JUR. Fraud & Deceit § 244 (1939); see, e.g., Romero v. Sanchez, 83 N.M. 358, 492 P.2d 140 (1971); Delgado v. Costello, 91 N.M. 732, 580 P.2d 500 (Ct. App. 1978); Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973). Finally, a finding supported by substantial evidence must be sustained on appeal. First National Bank of Santa Fe v. Wood, 86 N.M. 165, 521 P.2d 127 (1974); see Hertz v. Hertz, ___ N.M. ___, 657 P.2d 1169 (1983).

The record indicates that on June 15, 1979, Husband and Wife entered into a contract for the purchase of a residence at 441 W. Ethel, Las Cruces, New Mexico, as joint tenants with right of survivorship. The residence was paid for out of Husband's

separate fund obtained through an inheritance. Up to this point, Husband had never seen an American deed because he was from England. He also did not know the differences among "tenants in common", "joint tenancy", "separate property" and "community property". After entering into the contract, Wife alone consulted with an attorney who suggested that Wife take title to the residence in her name only, as her sole and separate property, and accordingly prepared a warranty deed that named Wife as the sole grantee. Thereafter, Wife refused to move into the family's residence unless title to the house was in her name only. Husband, while ill and under medication, then signed the warranty deed.

Therefore, after reviewing the record, we determine that the facts in this case sufficiently allege fraud, and hold that the district court did not err because there was sufficient evidence to find that the warranty deed was signed by Husband as a result of undue influence, duress and coercion.

II. Separate Property Lien

Wife argues that the district court erred in concluding that Husband also be reimbursed for his $12,000.00 of separate funds used for improvements for the parties' residence. We disagree.

At trial, under oath and during direct examination, Husband testified that he added both an 1100 square-foot solar greenhouse and skylights to the home, and that he had the home's roof repaired, at a total cost of approximately $12,000.00. Husband further testified that the money came from his inheritance with no contribution whatsoever from Wife for these additions or repairs. Wife, on the other hand, offered no testimony in rebuttal.

On appeal, we do not weigh the evidence. Rather, it is our obligation to review the district court's findings to determine if they are supported by substantial evidence. If there is substantial evidence to support the district court's findings, we will not reverse such findings on appeal. First National Bank of Santa Fe v. Wood, supra; see Hertz v. Hertz, supra. The uncontradicted evidence presented to the district court is that Husband was able to trace a $12,000.00 separate property interest in the parties' residence.

Therefore, after reviewing the record, we determine that the district court did not err in concluding that Husband be reimbursed for his $12,000.00 separate funds. See Hertz v. Hertz, supra.

III. Diamond Rings

Wife argues that "[i]t is not contested that the three [diamond] rings at issue were [originally] the sole separate property of [Husband]: they were a part of an inheritance." Nevertheless, Wife claims that Husband made a gift of the double diamond ring, a diamond solitaire ring, and his mother's engagement rings, and that Wife accepted these gifts. Therefore, Wife argues that the district court erred in finding that the three diamond rings be declared the sole and separate property of Husband, having been part of his inheritance. We disagree.

We have held that the essential elements of a gift between a husband and wife are delivery, actual or constructive, and intent of the donor to divest himself of all dominion and control. Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963). Furthermore, the burden is on the donor, Wife in this case, to prove by clear and convincing evidence all facts essential to a valid gift. If there is conflicting testimony as to the facts essential to a valid gift, then the district court is the judge of the credibility of the witnesses and the weight to be given their testimony. On appeal, we will not weigh the evidence where there was conflicting testimony and substantial evidence to support the district court's finding. Webb v. Richardson, 69 N.M. 15, 363 P.2d 626 (1961).

The record specifically indicates that Husband never intended for ownership of the rings to part from him. Therefore, we determine that the district court did not err in finding that these rings are Husband's sole and separate property.

IV. Visitation Rights

Wife claims that unless the district court grants a block period free from visitation with Husband their minor son will be unable to visit either his grandparents or the rest of his extensive family who reside in Ohio. Wife also claims that their minor son is suffering duress and anxiety from the current visitation schedule because it leaves him uncertain

about where he lives. Therefore, Wife argues that the district court erred in its conclusion regarding child custody and visitation rights. We disagree.

We have repeatedly held that a district court has wide discretion in awarding custody of a child in a divorce case, and that the welfare of the child is of primary importance in making the award. Creusere v. Creusere, 98 N.M. 788, 653 P.2d 164 (1982); Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980); Gholson v. Gholson, 82 N.M. 473, 483 P.2d 1313 (1971); Urzua v. Urzua, 67 N.M. 304, 355 P.2d 123 (1960). Furthermore, we have held that "[t]he determination of the trial judge, who saw the parties, observed their demeanor and heard the testimony will not be overturned absent a manifest abuse of discretion. Ridgway v. Ridgway, supra, at 347, 610 P.2d at 751 (emphasis added).

The record indicates that both Husband and Wife presented expert witnesses in regard to child custody and child visitation. Both expert witnesses gave testimony that included their respective opinions about joint custody. The record further indicates that the district court concluded that Wife should be awarded custody of the parties' minor son, with visitation rights awarded to Husband as follows: alternate weekends beginning on Friday at 6:00 p.m. and ending on Sunday at 6:00 p.m., alternate Wednesdays beginning at 6:00 p.m. and ending at 8:00 a.m. Thursday morning, plus alternate major holidays and one month summer vacation. After reviewing the record, we find no abuse of discretion regarding child visitation, in the absence of which we will not reverse the district court's determination.

V. Wife's Health

The district court found that Wife "is a healthy, intelligent person with a B.A. degree in Psychology plus one year of post-graduate education." On appeal, Wife argues that the district court erred in making its finding that Wife is "healthy" because there is a total absence of anything in the record to support this finding and because Wife has been previously treated for cancer. We disagree.

The record indicates that Wife was employed at the time of trial. Furthermore, the district court concluded that Wife be provided with spousal support until October 1983, in

order to permit her to continue in her efforts to re-establish herself in the job market. Therefore, after a review of the record, we determine that the district court did not err because there is substantial evidence to support the finding that Wife is "healthy." First National Bank of Santa Fe v. Wood, supra; see Hertz v. Hertz, supra.

Conclusion

The judgment of the district court is affirmed.

This case is not to be published nor cited as precedent.

IT IS SO ORDERED.

WILLIAM RIORDAN, Justice

WE CONCUR:

DAN SOSA, JR., Senior Justice

HARRY E. STOWERS, JR., Justice

IN THE SUPREME COURT OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner - Appellee,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent - Appellant.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

The Honorable Joe Calvan Presiding

H. Gregg Privette
215 South Campo Street
Las Cruces, New Mexico 88001
Attorney for Respondent - Appellant

Graden W. Beal
1670 North Main Street
Las Cruces, New Mexico 88004
Attorney for Petitioner - Appellee.

STATEMENT OF JURISDICTION

The appellate jurisdiction of the supreme court is coextensive with the state and extends to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals. Sect. 34-5-14 A., N.M.S.A. 1978.

Jurisdiction in this cause is not vested in the court of appeals under Sect. 34-5-8, N.M.S.A. 1978, as this is an action for divorce.

IN THE DISTRICT COURT OF DONA ANA COUNTY, NEW MEXICO

FILED
1982 AUG 30 AM 10:05
DISTRICT COURT
DONA ANA COUNTY, N.M.
BERNICE HAYNES, CLERK
DOCKETED

IN THE MATTER OF THE DISSOLUTION OF THE MARRIAGE OF

MALCOLM DOUGLAS ELLIOTT,

Petitioner,

and

CHARLEE EVELYN ELLIOTT,

Respondent.

No. DR 80-456
Judge Galvan

FINAL DECREE OF DIVORCE

THIS MATTER having come on before the Court for hearing upon the verified Petition filed herein by the Petitioner; and the Petitioner appearing in person, and by and through his attorneys, Beal and Beal, P.A., and the Respondent appearing in person, by and through her attorney, H. Gregg Privette; and the Court having examined the pleadings filed herein, and having heard the evidence adduced by the parties, and being fully advised in the premises, finds:

1. The Petitioner is now, and for more than six months next preceding the filing of the Petition herein, has been a resident in good faith of the State of New Mexico, and this Court has jurisdiction of the parties and of the subject matter of this litigation.

2. The Petitioner and Respondent were heretofore married on the 12th day of December, 1975, and are now

FILED
Date 8-82
No. 3090

permanently separated.

3. One child, namely, Lucas Loren Elliott, has been born to this marriage. Permanent care, custody and control of said minor child is hereby awarded to the Respondent, reserving to the Petitioner reasonable visitation rights to include those set out in order of the Court dated August 26, 1980, and Findings of Fact and Conclusions of Law issued by this Court.

4. The Findings of Fact and Conclusions of Law issued by this Court are hereby incorporated into this Final Decree and the parties ordered to implement the terms thereof in regard to division of community property, child custody, child visitation, child support and spousal support.

5. The parties to this marriage have become incompatible and because of discord and conflict of personalities, the legitimate ends of the marriage relationship are destroyed, preventing any reasonable expectation of reconciliation and a divorce should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner, Malcolm Douglas Elliott, be, and he hereby is, granted an absolute divorce from the Respondent, Charlee Evelyn Elliott, and the bonds of matrimony existing between the parties be, and they hereby are, forever severed and dissolved and the Petitioner restored to all the rights and privileges of a single and unmarried person.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the

Date 8-82
No. 2091

Findings of Fact and Conclusions of Law issued by this Court as to division of community property, child custody, child visitation, child support and spousal support pursuant to this divorce be, and the same hereby is, incorporated in this Final Decree in all respects as if fully set forth verbatim; and the parties are hereby ordered to execute whatever documents of title necessary to implement the transfer of the property set aside to the other party pursuant to the Findings of Fact and Conclusions of Law issued by this Court.

DATED:

District Judge

APPROVED:

Graden W. Beal, Attorney
for Petitioner

H. Gregg Privette, Attorney
for Respondent

MICRO
Date 8-82
No. 2092

IN THE THIRD JUDICIAL DISTRICT COURT, DONA ANA COUNTY, NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent.

FILED

DOCKETED

No. DR2-[illegible]-345610 41
Judge Galvan

NOTICE OF APPEAL

Comes now Respondent and gives notice that she will appeal the Final Order and Decree entered in the above styled and numbered cause. Specifically, she will appeal that portion of the Final Order which awards one half of the residence at 441 W. Ethel to Petitioner; that portion which orders the house to be sold; that portion which creates a lein on said house in favor of the Petitioner; that portion of the order which awards Petitioner the three diamond rings; and that portion of the order which establishes visitation rights on the part of the Petitioner.

H. Gregg Privette

H. Gregg Privette
Attorney for Respondent
215 South Campo St.
Las Cruces, New Mexico

I hereby certify that a copy of the foregoing Notice of Appeal was delivered to opposing Attorney of Record this 2nd day of September, 1982.

H. Gregg Privette

IN THE THIRD JUDICIAL DISTRICT COURT, DONA ANA COUNTY, NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	'82 SEP 29 PM 12:42
	)	
CHARLEE EVELYN ELLIOTT,	)	
	)	No. DR - 80 - 456
Respondent.	)	Judge Galvan

FIRST AMENDED NOTICE OF APPEAL

Comes now Respondent and gives notice that she will appeal to the Supreme Court the Final Order and Decree entered in the above styled and numbered cause. Specifically she will appeal that portion of the Final Order which awards one half of the residence at 441 W. Ethel to Petitioner: that portion which orders the house to be sold: that portion which creates a lein on said house in favor of the Petitioner: that portion of the order which awards Petitioner the three diamond rings: and that portion of the order which establishes visitation rights on the part of the Petitioner.

H. Gregg Privette

H. Gregg Privette
Attorney for Respondent
215 South Campo St.
Las Cruces, New Mexico

I hereby certify that a copy of the foregoing First Amended Notice of Appeal was delivered to opposing Attorney of Record this 29th day of September, 1982.

H. Gregg Privette

IN THE THIRD JUDICIAL DISTRICT COURT, DONA ANA COUNTY, NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,)
)
Petitioner,)
)
vs.)
)
CHARLEE EVELYN ELLIOTT,)
) No. DR - 80 - 456
Respondent.) Judge Galvan

CERTIFICATE OF SATISFACTORY ARRANGEMENTS

I, Johnny Tirres, official court reporter, do hereby certify that satisfactory arrangements have been made with me for preparation of the record on appeal in the above styled and numbered cause.

Johnny Tirres
Johnny Tirres

I, Bernice Maynez, Clerk of the Third Judicial District Court, do hereby certify that satisfactory arrangements have been made for payment of costs in the above styled and numbered cause.

/S/ BERNICE MAYNEZ
Bernice Maynez

IN THE SUPREME COURT OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner - Appellee,

vs.

CHARLEE EVELYN ELLIOTT, No.

Respondent - Appellant.

MOTION FOR EXTENTION OF TIME

Comes now Appellant in the above styled and numbered cause and moves the Court to grant an extention of time, until October 11, 1982, in which to file the skeleton transcript in said cause. In support of this motion the Appellant would show the Court:

1. Request for this extention was timely made.

2. Opposing counsel was advised of this request and voiced no opposition.

3. Appellant filed a Notice of Appeal and, with leave of the District Court, an Amended Notice of Appeal in this cause. Counsel for Appellant was unable to determine which of the notices would have been operative from the standpoint of time and requested this extention in case the first filed notice would be determined to be the notice from which time began to run.

4. Appellee will not be prejudiced by the granting of this request.

WHEREFORE, Appellant requests the Court to grant an extention until October 11, 1982, in which to file the skeleton transcript herein.

H. Gregg Lovett

I hereby certify that a copy of the foregoing motion and the proposed order was delivered to opposing counsel the 6th day of October, 1982.

H. Gregg Lovett

IN THE SUPREME COURT OF NEW MEXICO

MALCOLM DOUGLAS ELLIOTT,

Petitioner - Appellee,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent - Appellant.

ORDER EXTENDING TIME

Appellant having moved the Court to grant an extention of time in which to file the skeleton transcript in the above styled and numbered appeal: said request having been timely made: opposing counsel having been advised of the request and having voiced no opposition thereto: and it appearing that there is sufficient cause to grant said extention and Appellee will not be prejudiced thereby:

IT IS THEREFORE ORDERED that Appellant be, and she hereby is, granted an extention of time, until October 11, 1982, in which to file the transcript denominated skeleton transcript in the above styled and numbered appeal.

_____

Chief Justice

IN THE THIRD JUDICIAL DISTRICT COURT, DONA ANA COUNTY, NEW MEXICO

MALCOLM DOUGLASS ELLIOTT,

Petitioner,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent.

FILED

'82 AUG 26 P4:28

No. DR - 80 - 456

Judge Ga[illegible]

DISTRICT COURT
DONA ANA COUNTY
BERNICE MAYNE LOERA

RESPONDENT'S REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

REQUESTED FINDING OF FACTS

Comes now Respondent who requests the Court to make the following Findings of Fact in the above styled and numbered cause:

1. Both parties have, at all times material hereto, been residents of Dona Ana County, New Mexico.

2. The parties were married to each other on the 12th day of December, 1975, and are now permanently separated.

3. Due to discord, disagreements and conflict of personalities the parties are incompatible.

4. As issue of the marriage the parties have one son, Lucas, age 5 years, 8 months.

5. Respondent is the fit and proper person to have the care, custody and control of the minor child.

6. On the 15th day of June, 1979, the parties entered into a contract of purchase and sale for the purchase of a residence at 441 W. Ethel, Las Cruces, Dona Ana County, New Mexico, whereby title to the house and lot would be acquired in the names of both parties as Joint Tenants with right of survivorship.

7. After the execution of the real estate contract Petitioner committed several intentional acts which tended to jeopardize Respondent and her children. The acts were a continuation of Petitioner's irresponsible behavior and as a result thereof Respondent refused to move into the house unless the title thereto was held so that the children would be assured a secure place in which to live.

8. Petitioner and Respondent both went to the real estate agent and [illegible]

quested that the real estate contract be changed so as to accomplish the secured interest of the children in the residence. The real estate agent advised both parties that he could not do that for them and he advised them to see an attorney.

9. At the time that both parties went to the real estate agent to change the contract Petitioner was taking no medication and he was not acting under duress or coercion.

10. Respondent made an appointment with an attorney to accomplish what both parties had agreed to. The appointment was for both parties and Petitioner was advised of the appointment, but he elected not to attend.

11. The attorney whose services were sought advised against putting the title to the realty in the names of the children because of their tender ages. He advised that the security of the children could best be accomplished by having the deed to the property in Respondent's name. Petitioner read the letter from the attorney with his advice stated therein and Petitioner agreed with the advice of the attorney.

12. The ultimate source of the funds used to pay for the house was Petitioner's inheritance. However, prior to the purchase of the house the inherited money had been converted to certificates of deposits and checking accounts. The checking accounts were in both names and the certificates of deposit were held by Petitioner and Respondent as joint tenants with the right of survivorship.

13. At the time of the closing of the real estate transaction Petitioner, Respondent, the real estate agent and the title company officer were present. Petitioner carefully read and had explained to him all of the documents, including the Warranty Deed naming Respondent as grantee.

14. At the time of the closing of the real estate transaction Petitioner showed no signs of illness and there was no indication of duress or coercion.

15. Immediately after the closing Petitioner and Respondent journeyed to Albuquerque where they purchased household furniture that day. They parted that night and then returned to Las Cruces the next day, with Petitioner driving from

Albuquerque to Las Cruces.

16. After the purchase of the house a green house was added. The ultimate sourse of the funds for the greenhouse was co-mingled and community property and the majority of the work was done by Petitioner.

17. Petitioner intended that the house should be secured for the minor children and the house was conveyed to Respondent to accomplish this purpose. Therefore, Respondent is the sole owner of the residence at 441 W. Ethel.

18. Respondent acquired certain funds by gift or inheritance in the amount of $700.00, which is her sole, separate property.

19. The parties acquired a Subaru Station Wagon which should be set aside to Respondent along with the cab-over camper.

20. The household furniture and furnishings have been comingled from gifts, inheritance and purchase and are community property.

21. Petitioner inherited three diamond rings which he had sized to fit Respondent, which he gave to her, along with a gold band, and which she accepted. All four rings are declared to be the sole, separate property of Respondent.

22. Respondent should be awarded the $1,000.00 in savings which she has in her possession and Petitioner should be awarded the $1,000.00 in savings which he has in his possession.

23. The business known as Solar Mart was begun by Petitioner and the ultimate sourse of the funds used in the business was Petitioner's inheritance, which had been comingled. The business known as Solar Gain was conceived by Respondent who did most of the development work thereon. Both businesses are community property.

24. The business known as Solar Mart no longer exists. The sole business owned by the parties is Solar Gain.

REQUESTED CONCLUSIONS OF LAW

Respondent requests the Court to make the following Conclusions of Law:

1. The Court has jurisdiction over the parties and the subject matter.

2. Petitioner is entitled to an absolute divorce from Respondent on the

grounds of incompatibility.

3. Custody of the parties minor child should be awarded to Respondent, with visitation rights awarded to Petitioner as previously ordered by the Court, plus alternate major holidays and one month summer vacation. Respondent shall be awarded one month vacation time each year with the minor child during which time Petitioner's visitation shall abate.

4. Petitioner shall pay child support to Respondent in the sum of $200.00 per month until the child reaches the age of 18 years, is married or otherwise emancipated.

5. Petitioner has been providing spousal support since October, 1980, in the amount of $125.00 per month and shall continue to provide spousal support until October, 1983, in order to permit Respondent to continue in her efforts to re-establish herself in the job market.

6. The burden of proof that Petitioner signed the Warranty Deed in favor of Respondent while under undue influence, duress and coercion is Petitioner's burden. He failed to meet that burden of proof by any credible testimony. Therefore the title to the residence at 441 W. Ethel shall remain in Respondent.

7. The division of furniture and household furnishings as accomplished by the parties is approved by the Court.

8. The three diamond rings were a gift from Petitioner to Respondent.

9. The remainder of the property shall be divided as set forth in the foregoing Findings of Fact.

10. This action was instituted by Petitioner causing Respondent to pay $3,700.00 in reasonable attorney fees and Petitioner shall pay to Respondent $3,700.00 as attorney fees herein.

Respectfully submitted.

_____

H. Gregg Privette, Attorney for Respondent

I hereby certify that a copy of the above was delivered to opposing Attorney of Record this 26th day of August, 1982.

_____

ENDORSED COPY

IN THE DISTRICT COURT OF DONA ANA COUNTY, NEW MEXICO

FILED

'82 AUG 19 P1:05

MALCOLM DOUGLAS ELLIOTT,

Petitioner,

vs.

CHARLEE EVELYN ELLIOTT,

Respondent.

No. DR-80-456

Judge Galvan

COURT'S
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Findings of Fact

1) The parties hereto at all material times have been and are residents of Dona Ana County, New Mexico.

2) The parties were married to each other on the 12th day of December, 1975, and are now permanently separated.

3) Due to discord, disagreements and conflict of personalities the parties are incompatible.

4) As issue of the marriage the parties have one son, Lucas, age 5 years, 8 months.

5) The parties are both fit and proper persons to have the care, custody and control of their minor son.

MICRO
Date 8-82
No. 1737

6) The least detrimental environment for custody of the parties' minor child is with respondent wife.

7) Respondent is a healthy, intelligent person with a B.A. degree in Psychology plus one year of post-graduate education.

8) On the 15th day of June, 1979 the parties entered into a contract of purchase and sale for the purchase of a residence at 441 W. Ethel, Las Cruces, Dona Ana County, New Mexico, whereby title to the house and lot would be acquired in the names of both parties as Joint Tenants with right of survivorship.

9) That after execution of the real estate contract, respondent alone consulted with an attorney who suggested respondent take title in her name only, as her sole and separate property, and accordingly prepared the warranty deed naming respondent as the sole grantee.

10) That the residence was paid for out of petitioner's separate funds obtained through an inheritance.

11) That thereafter, petitioner, while ill and under medication, signed the deed under duress and coercion, respondent having refused to move into the family's residence unless title to the house was in her name only.

12) That after purchase of the house, petitioner made improvements to the house using separate funds from his inheritance in the amount of $12,000.00.

MICRO.
Date 8-82
No. 1738

13) That, although the residence was paid for out of petitioner's inheritance, the intention of petitioner was that the residence would be owned by the parties as joint tenants and therefore made a gift to respondent of an undivided one-half interest in the residence.

14) That the parties are joint owners of the residence at 441 W. Ethel, subject to a lien in favor of petitioner as his separate property in the sum of $12,000.00.

15) That petitioner received an inheritance including certain jewelry which he has maintained separately and not commingled, with the exception of the funds used for the purchase of the real estate already described.

16) Respondent acquired certain funds by gift or inheritance in the amount of $700.00, which are her sole and separate property.

17) The parties acquired a Subaru Station Wagon which should be set aside to respondent along with the cab-over camper.

18) The household furniture and furnishings have been commingled from gifts, inheritance and purchase and are community property.

19) The gold band should be awarded to respondent and the remaining three rings are declared to be the sole and separate property of petitioner, having been part of his inheritance.

FILED
Date 8-8-2
No. 1234

20) That respondent should be awarded the $1,000.00 in savings which she has in her possession and petitioner should be awarded the $1,000.00 in savings which he has in his possession.

21) That the business known as Solar Mart was begun by petitioner using his separate funds and should be declared to be his separate property.

22) That the boat acquired by the parties is community property.

Conclusions of Law

1) That the Court has jurisdiction over the parties and subject matter.

2) That petitioner is entitled to an absolute divorce from respondent on the grounds of incompatibility.

3) That custody of the parties minor son should be awarded to respondent, with visitation rights awarded to petitioner as previously ordered by the Court, plus alternate major holidays and one month summer vacation.

4) That petitioner shall pay child support to respondent in the sum of $200.00 per month until the child reaches the age of 18 years, is married or otherwise emancipated.

5) That petitioner has been providing spousal support since October, 1980 in the amount of $125.00 per month and

8-82
1740

shall continue to provide spousal support until October, 1983 in order to permit respondent to continue in her efforts to re-establish herself in the job market.

6) That the warranty deed in favor of respondent was signed by petitioner as a result of undue influence, duress and coercion.

7) That the parties' residence at 441 W. Ethel, Las Cruces, New Mexico, should be sold and the proceeds divided by the parties after petitioner is reimbursed the $12,000.00 of separate funds used for improvements thereon and respondent is reimbursed the $700.00 of her gift or inheritance.

8) That the boat should be sold and the proceeds divided equally between the parties.

9) That petitioner's inheritance is hereby declared to be the separate property of petitioner with the exceptions noted in the foregoing Findings of Fact.

10) That the remainder of the property should be divided as set forth in the foregoing Findings of Fact.

11) That petitioner should pay to respondent the sum of $1,000.00 as and for her attorney fees herein.

12) That the division of furniture and household furnishings as accomplished by the parties is hereby approved by the Court.

DISTRICT JUDGE

8-88
No. 1241

IN THE DISTRICT COURT OF DONA ANA COUNTY, NEW MEXICO

IN THE MATTER OF THE DISSOLUTION OF THE MARRIAGE OF MALCOLM DOUGLAS ELLIOTT, Petitioner, and CHARLEE EVELYN ELLIOTT, Respondent.	No. DR 80-456 Judge Galvan

RESPONSE TO COUNTERCLAIM

COMES NOW, Malcolm Douglas Elliott, Petitioner in the above-entitled and numbered cause, and for his response to Respondent's Counterclaim states and alleges as follows:

1. Admits the allegations contained in paragraphs 1 through 4.

2. In responding to paragraph 5 of the Counterclaim, states that he is also a fit and proper person to have the care, custody and control of the parties' minor child and asks the Court to award custody as it deems in the best interest of said minor child.

3. Petitioner admits legal responsibility for financial support of the minor child, but affirmatively states that Respondent is equally obligated for the financial support of said child.

4. Admits that the parties have accumulated certain community property, which community property should be divided equitably by the Court after having determined which property is community and which property is separate property.

5. Petitioner denies each and every allegation contained in paragraph 8 of the Counterclaim and affirmatively states that Respondent is an able-bodied person, has a college

degree and fully capable of being self-supporting.

6. Petitioner denies each and every allegation contained in paragraph 9 of the Counterclaim and affirmatively states that Respondent has withdrawn large amounts of money from joint savings account and is well able to pay for her own attorneys' fees and costs.

7. Admits the allegations contained in paragraph 10.

8. Denies each and every allegation not specifically admitted herein.

MAYFIELD & BEAL, P.A.
Attorneys for Petitioner
P.O. Box 68
Las Cruces, NM 88001

_____
Graden W. Beal

STATE OF NEW MEXICO)
) ss.
COUNTY OF DONA ANA)

Malcolm Douglas Elliott, after being duly sworn, upon oath, states that he is the Petitioner hereinabove named, that he has read the foregoing Response to Counterclaim and that the facts and matters contained therein are true and correct to the best of his knowledge and belief.

_____
Malcolm Douglas Elliott

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this _____ day of July, 1980, by Malcolm Douglas Elliott.

_____
Notary Public

My Commission Expires:

_____

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing to opposing counsel of record, Randolph L. Reese, P.O. Box 725, Las Cruces, New Mexico, 88001, and

Linda E. Wingfield, P.O. Box 1561, Las Cruces, New Mexico, 88001, this _____ day of July, 1980.

_____

IN THE DISTRICT COURT OF DONA ANA COUNTY, NEW MEXICO

IN THE MATTER OF THE DISSOLUTION OF THE MARRIAGE OF MALCOLM DOUGLAS ELLIOTT, Petitioner, and CHARLEE EVELYN ELLIOTT, Respondent.	)	No. DR 80-456 Judge Joe H. Galvan

RESPONSE TO PETITION FOR DIVORCE
AND COUNTERCLAIM

Respondent, Charlee Evelyn Elliott, in response to petitioner's petition states:

1. She admits the allegations of paragraphs 1, 2, 6 and 7.

2. She denies the allegations of paragraph 3 and further answering states that the parties were married on December 12th, 1975 and cohabited together as husband and wife until on or about May 14th, 1980.

3. She admits that one child has been born to the marriage, namely, Lucas Loren Elliott, born on December 29th, 1976 and she denies the remaining allegations of paragraph 4.

4. She denies the allegations of paragraph 5.

5. She denies all allegations not specifically admitted.

WHEREFORE, respondent prays for judgment dismissing petitioner's petition with prejudice and for judgment for the relief requested in her counterclaim.

C O U N T E R C L A I M

Respondent states:

1. Respondent has resided in this state for six months immediately preceding the date of filing of this counterclaim and has a domicile in New Mexico.

2. Petitioner is a resident of Dona Ana County, New Mexico.

3. The parties were legally married on December 12th, 1975, and lived together as husband and wife until on or about May 14th, 1980, at which time they permanently separated.

4. There has been one child born as issue of the marriage, namely, Lucas Loren Elliott, born December 29th, 1976.

5. Respondent is a fit and proper person to have the care, custody and control of the child and it is in the best interest of the child that his care, custody and control be awarded to respondent, subject to reasonable rights of visitation by petitioner.

6. Petitioner should be ordered to pay reasonable amount of child support to respondent.

7. During the marriage, the parties accumulated community property and the community property should be divided according to law and justice.

8. Respondent is dependent upon petitioner for her support and maintenance and the Court should order petitioner to pay respondent a reasonable amount as and for alimony.

9. The Court should award respondent a reasonable amount to reimburse her for her attorney's fees and costs herein.

10. Because of discord and conflict of personalities, the legitimate ends of the marriage relationship have been destroyed preventing any reasonable expectation of reconciliation and the parties are incompatible.

WHEREFORE, respondent prays for an absolute divorce from petitioner, for custody of the parties' minor child, for an award of child support, for an equitable division of the community property, for an award of attorney's fees and costs and for such other relief as the Court deems proper.

SAGE AND REESE

By _____
Randolph L. Reese
Attorneys for respondent
Post Office Box 725
Las Cruces, New Mexico 88001
523-7411

_____
LINDA E. WINGFIELD,
Co-counsel for respondent
Post Office Box 1561
Las Cruces, New Mexico 88001
523-8581

STATE OF NEW MEXICO)
: ss.
County of Dona Ana)

CHARLEE EVELYN ELLIOTT, being first duly sworn, upon oath states that she is the person named respondent in the foregoing pleading and the statements and things contained therein are true and correct to the best of her knowledge, information and belief.

_____
Charlee Evelyn Elliott

SUBSCRIBED AND SWORN TO before me on May 23, 1980.

_____
Notary Public

My Commission Expires:
Expires 14, 1984

Certificate Of Mailing

We hereby certify that a true copy of the foregoing pleading was mailed to opposing counsel of record this 3 day of ~~May~~ June, 1980.

SAGE AND REESE

By Randolph L. Reese
Randolph L. Reese

64

SUMMONS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF DONA ANA, STATE OF NEW MEXICO.

MALCOLM DOUGLAS ELLIOTT,

Plaintiff,

CHARLEE EVELYN ELLIOTT,

No. DR 80- 456
Judge

Defendant.

THE STATE OF NEW MEXICO

TO Charlee Evelyn Elliott
441 W. Ethel
Las Cruces, NM 88001

_____, Defendant.

GREETING: You are hereby directed to serve a pleading or motion in response to the complaint within 30 days after service of this summons, and file the same, all as provided by law.

You are notified that, unless you so serve and file a responsive pleading or motion, the plaintiff will apply to the court for the relief demanded in the complaint.

ATTORNEY OR ATTORNEYS FOR PLAINTIFF:

Graden W. Beal

ADDRESS OF ATTORNEYS FOR PLAINTIFF (or of plaintiff, if no attorney):

P.O. Box 68, Suite 216, First National Bank Tower, Las Cruces, NM 88001

WITNESS THE HONORABLE Garnett R. Burks, Jr., District Judge of the Third Judicial District Court of the State of New Mexico, and the seal of the District Court of Dona Ana County, this 13th day of May A. D., 19 80.

BERNICE MAYNEZ Clerk

(Seal)

By _____ Deputy

IN THE DISTRICT COURT OF DONA ANA COUNTY, NEW MEXICO

IN THE MATTER OF THE DISSOLUTION OF THE MARRIAGE OF

MALCOLM DOUGLAS ELLIOTT,

Petitioner,

and

CHARLEE EVELYN ELLIOTT,

Respondent.

FILED '80 MAY 19 2:31 DISTRICT COURT DONA ANA COUNTY, N.M.

ENDORSED COPY

No. DR 80-456
Judge

PETITION FOR DIVORCE

COMES NOW, Malcolm Douglas Elliott, Petitioner, by and through his attorneys, Mayfield and Beal, and states as follows:

1. Petitioner is now, and for more than six months next preceding the filing of this Petition, has been a resident in good faith of the State of New Mexico.

2. Respondent is a resident of Dona Ana County, New Mexico.

3. Petitioner and Respondent were heretofore married in November, 1975, in Grant County, New Mexico, and are living under the same roof, but have not cohabited as husband and wife since the 12th day of May, 1980.

4. One child has been born to this marriage, namely, Lucas Loren Elliott, who was born on the 29th day of December, 1976; and said minor child is now in the actual custody of Petitioner herein, who is the proper person to have the permanent care, custody and control over said minor child, subject to the reasonable rights of visitation by the Respondent.

5. During the course of this marriage, the parties hereto have acquired certain items of community property to

be divided equitably between the parties. Petitioner has purchased certain property with his separate funds which were inherited and such property should be declared his separate property regardless of manner in which the title is presently held. Community property and separate property is set out in specificity on a separate list which is appended hereto and made a part hereof by reference as Exhibit "A".

6. During the course of this marriage, the parties hereto have incurred no community debts which are now outstanding.

7. The parties to this marriage have become incompatible and because of discord and conflict of personalities, the legitmate ends of the marriage relationship are destroyed preventing any reasonable expectation of reconciliation and a divorce should be granted.

WHEREFORE, the Petitioner prays judgment against the Respondent as follows:

A. For an order granting Petitioner an absolute divorce from Respondent.

B. That the Court divide the community property and allocate the community debts in a fair and equitable manner.

C. For such other and further relief as the Court may deem proper in the premises.

MAYFIELD & BEAL, P.A.
Attorneys for Petitioner
P.O. Box 68
Las Cruces, NM 88001

_____
Graden W. Beal

STATE OF NEW MEXICO)
) ss.
COUNTY OF DONA ANA)

Malcolm Douglas Elliott, after being duly sworn, upon

oath, states that he is the Petitioner hereinabove named, that he has read the foregoing Petition and that the facts and matters contained therein are true and correct to the best of his knowledge and belief.

Malcolm Douglas Elliott

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this _____ day of May, 1980, by Malcolm Douglas Elliott.

Notary Public

My Commission Expires:

_____

EXHIBIT "A"

COMMUNITY PROPERTY

Certain items of furniture

Appliances

One 1960 International Harvester 3/4 ton pickup

SEPARATE PROPERTY OF PETITIONER

Residence located at 441 W. Ethel, Las Cruces, New Mexico purchased with Petitioner's separate funds, which were an inheritance

1979 Subaru four-wheel drive wagon, purchased with Petitioner's separate funds, which were an inheritance

Certain furniture, including an antique dining room set purchased with Petitioner's separate funds, which were an inheritance